Supreme Court of the United States

OCTOBER TERM 1945

No. 429

MOSES B. SHEER,

Petitioner,

against

ANACONDA WIRE AND CABLE COMPANY and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

MOSES B. SHEER,
Petitioner pro se.

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To the Supreme Court of the United States and to the Honorable the Chief Justice and the Justices thereof:

The petition of the relator, Moses B. Sherr, for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit respectfully shows to this Court:

A

The Jurisdiction of This Court

The jurisdiction of this Court rests upon §240 of the Judicial Code, 28 U. S. C., §347.

B

Summary Statement of the Matter Involved

Petitioner asks this Court to review the Circuit Court's affirmance (R. 69) of the judgment of the District Court for Southern New York dismissing the action for lack of jurisdiction (R. 46). A review is also sought of the Circuit Court's denial of rehearing (R. 68).

The opinion of the District Court (R. 47), by Leibell, D. J., is reported 57 F. Supp. 106. That of the Circuit Court (R. 60), by L. Hand and Clark, C. JJ. (Clark, C. J., concurring), is reported 149 F. 2d 680.

The Circuit Court filed its opinion on May 25, 1945 (R. 60). On June 5, 1945, within the fifteen days allowed by Rule 27 of the Circuit Court, petitioner moved for a rehearing (R. 62) which the Circuit Court denied on June 8, 1945 (R. 68). The Circuit Court's judgment of affirmance was entered June 16, 1945 (R. 69).

1. Character of the action

This is a *qui tam* action brought by the petitioner as relator on behalf of himself and the United States against the Anaconda Wire and Cable Company ("Anaconda" hereafter) pursuant to the False Claims Statute, 12 Stat. 698; R. S., §§3490-3493; 31 U. S. C., §§231-234 (Appendix A, *infra*, p. 32).

The complaint (R. 3) alleges that Anaconda, under contracts with the Army and Navy, delivered defective wire and cable. Anaconda and some of its officials—who are named as defendants but have not been served—fraudulently concealed the defects and thus induced the Government to accept delivery and to pay the contract price. The complaint demands judgment in favor of the United States and petitioner for double the damages sustained by the United States, for the statutory forfeitures, for interest and costs.

2. The proceedings below

The action was commenced December 23, 1942, in the District Court for Southern New York (R. 1). Concededly it was based on information which was then in the possession of the United States (R. 35).

One year after the suit was brought, on December 23, 1943, Congress amended the False Claims Statute: Ch. 377, Public Law No. 213, 78th Congress, First Session, 57

Stat. 608-9 (Appendix B, *infra*, p. 35). In March, 1944, following the amendment, the Government entered its appearance in this action (R. 8, 9). But two months later, in May, 1944, it commenced an independent suit of its own for the wrongs herein alleged (R. 36, 19).

In the present action the following motions were then made:

1. Petitioner moved to strike the Government's appearance (R. 10);

2. The Government moved to stay the prosecution of this action pending determination of its own suit (R. 13); and

3. Anaconda moved to dismiss this action on the ground that the 1943 amendment of the False Claims Statute had deprived the District Court of jurisdiction (R. 28).

Petitioner predicated his motion, and opposed those of the Government and of Anaconda, on the ground, among others, that the 1943 amendment, as applied to this case, deprives him of his property without due process of law, in violation of the Fifth Amendment of the Constitution (R. 11-12, 36-37).

The District Court denied the motions of petitioner and of the Government (R. 47). It found (as was conceded) that this suit is based on information in the possession of the United States at the time this suit was brought (R. 47); it sustained the constitutionality of the 1943 amendment; and it dismissed the action on the ground that the amendment had deprived it of jurisdiction (R. 46).

The Circuit Court, likewise upholding the new statute, affirmed (R. 60, 69) and, without further opinion, denied rehearing (R. 68).

3. The False Claims Statute, its interpretation by this Court, and its 1943 amendment

(a) *The pre-1943 statute*: The False Claims Statute (Appendix A, *infra*, p. 32) requires any person making fraudulent claims against the United States Government to pay it double damages, a forfeiture of $2,000 and the costs of the suit; R. S., §3490. The district courts of the United States have *exclusive* jurisdiction of such suits; R. S., §3491; Judicial Code, §256 (2), 28 U. S. C., §371 (2). These provisions have not been affected by the 1943 amendment.

Prior to the 1943 amendment the statute permitted "any person" to bring and carry on such suit "as well for himself as for the United States". The relator had to bear the "sole cost and charge" of the suit; he was not to withdraw it without the written consent of the Judge and the District Attorney; R. S., §3491.

The person "bringing said suit and prosecuting it to final judgment" was entitled to "one-half the amount of such forfeiture, as well as one-half the amount of the damages he shall recover and collect", and to all costs the Court might award against the defendant. The other half of the forfeiture and damages was to "belong to and be paid over to the United States". The relator was to be "liable for all costs incurred by himself" and was to "have no claim therefor on the United States". Costs were to be taxed according to any law or rule governing "suits between private parties"; R. S., §3493.

(b) *The interpretation of the statute by this Court:* In *U. S. ex rel. Marcus* v. *Hess*, 317 U. S. 537, at 545-8 (1943), this Court held, over the strenuous objection of the Government appearing as *amicus curiae*, that a relator could prosecute a *qui tam* action under the False Claims Statute even though he had derived all his information from the Government. "One of the chief purposes of the Act * * * was to stimulate action to protect the government against war frauds" (p. 547), even where the frauds were known to the Government. The statute was born out of the

apprehension of Congress that, because of official inertia, ineptness or dishonesty, even those frauds known to the Government would not be prosecuted with due zeal and skill. Congress therefore applied to the citizenry at large; invited them to undertake, at their own expense, the protection of their Government against fraud; and assured them, if successful, of a generous reward.

Promptly after the decision of the *Marcus* case the Government asked Congress to amend the False Claims Statute (*Cong. Rec.*, 78th Cong., 1st Sess., p. 5872, col. 1; p. 7571, col. 2-3; *House Rep.* No. 263). The amendment was enacted on December 23, 1943, one year after the commencement of this action (57 Stat. 608-9). References to the Congressional debates and other legislative materials are set forth in the footnote.*

(c) *The 1943 amendment of the False Claims Statute:* The amendment (Appendix B, *infra*, p. 35), repealed R. S., §3493, and completely reframed R. S. §3491. *Qui tam* actions (whether pending at the time of the amendment or brought thereafter) can be maintained only if they are based on information original with the relator. Notice of any such suit must be given to the United States Attorney who, within sixty days, may enter his appearance in the suit and take it over. If he does, the relator may be awarded reasonable compensation for the disclosure of his evidence or information, but not more than one-tenth of the recovery. If the United States Attorney does not take over, the relator may prosecute the action, in which case he may be awarded up to one-fourth of the recovery.

For present purposes it suffices to quote only one provision of the amendment:

> "The court shall have no jurisdiction to proceed with any * * * pending suit brought under this section whenever it shall be made to appear that such suit was based upon evidence or information in the possession

* 78th Cong., 1st Sess., *Sen. Rep.* No. 291, Parts 1 and 2; *House Rep.* Nos. 263 and 933; *Cong. Rec.*, pp. 2800-1, 5871-3, 7347, 7424, 7437-44, 7570-9, 7596-9, 7600-17, 10696, 10741-52, 10844-9.

of the United States, or any agency, officer or employee thereof, at the time such suit was brought" R. S., §3491 (C), as amended).

Once a *qui tam* suit is dismissed under this provision, the Government may bring an action of its own upon the same cause, for the whole amount of the forfeiture and damages allowed by the statute; and the relator in the first suit has no right to share in the Government's recovery.

The Courts below dismissed this action on the strength of the quoted provision.

4. The issues below

In the Courts below the basic question, whether the 1943 amendment takes petitioner's property without due process of law, resolved itself into several sharply contested issues.

(a) Petitioner contended that he has a contract right against the United States, protected by the Constitution, to prosecute this suit to judgment and to collect his half of the recovery. The pre-1943 False Claims Statute, said petitioner, constituted an offer of such a contract; and by commencing this suit petitioner accepted it (see Brief, *infra*, pp. 20-25).

Respondents denied that the False Claims Statute was an offer; but if it was, they argued that it could be revoked at any time before petitioner recovered final judgment; and the 1943 amendment effected the revocation.

(b) Independent of his contract theory, petitioner contended that upon commencement of this suit he became *by operation of law* the owner (as assignee *ex lege*) of one-half of the Government's claim against Anaconda; as such he had a vested right in the cause of action which could not be reappropriated by the Government. For this contention petitioner invoked a long line of authorities in England and in this country (see Brief, *infra*, pp. 13-20). Respondents denied their applicability.

(c) Petitioner contended that his rights were taken by the 1943 amendment. For although in terms the amendment purported only to terminate the jurisdiction of the district courts, it in effect destroyed petitioner's rights, since the district courts were the only and exclusive forum available to him, 28 U. S. C., §371 (2) (see Brief, *infra*, pp. 25-26).

Respondents, in turn, insisted that Congress is free to regulate the jurisdiction of the district courts (Constitution, Art. III, §1) and that the 1943 amendment was only an exercise of that power.

Such were the issues below. But the Circuit Court, as will presently be seen, avoided their determination and preferred to place its decision on a ground not raised, argued or briefed by any of the parties.

5. The opinions below

(a) *The District Court's opinion* (R. 47): In sustaining the constitutionality of the 1943 amendment, the District Court followed the reasoning of a dictum in *U. S. ex rel. Rodriguez* v. *Weekly Publications, Inc.*, 144 F. 2d 186, at 188 (C. C. A. 2, 1944). In the *Rodriguez* case the Circuit Court had stated (on the authority of *Norris* v. *Crocker*, 13 How. (54 U. S.) 429 (1854), and similar cases) that the "privilege of conducting the suit on behalf of the United States and sharing in the proceeds of any judgment recovered was an award of statutory creation which, prior to final judgment, was wholly within the control of Congress", and that the claim of unconstitutionality was "wholly illusory".

(b) *The Circuit Court's per curiam opinion* (R.): Upon petitioner's appeal herein, the Circuit Court professed to "see no reason to recede from the position" taken in the *Rodriguez* case. Having so said, the Circuit Court promptly abandoned that position and advanced an altogether new ground. It assumed, for argument, that petitioner was right in contending that the 1943 amend-

ment effected a "taking" of his property. But that "taking", it held, was not unconstitutional since it was not without "just compensation". For, according to the Circuit Court, by taking petitioner's property the Government impliedly contracted to pay him compensation, *U. S.* v. *Lynah*, 188 U. S. 445 (1903); petitioner may sue upon that implied contract in the Court of Claims, 28 U. S. C., §250 (1); and that recourse is an adequate remedy, *Yearsley* v. *Ross Construction Co.*, 309 U. S. 18 (1940); *Hurley* v. *Kincaid*, 285 U. S. 95 (1932).

In his application for rehearing (R. 62) petitioner urged that not every governmental taking of property raises an implied contract to pay compensation; such contract is implied only where the Government "takes property the ownership of which it concedes to be in an individual"; *U. S.* v. *Lynah, supra*, 188 U. S., at 465; *Tempel* v. *U. S.*, 248 U. S. 121, at 129-130 (1918). Here not even the Circuit Court "conceded" that petitioner had ownership rights in the property taken (i.e., the claim against Anaconda); much less did Congress so concede (see Brief, *infra*, pp. 27-30). Hence, no promise to pay compensation can be implied. Furthermore, even if it were assumed that Congress promised to pay compensation, still, under the Fifth Amendment, it could take petitioner's property only "for public use"; *Rindge* v. *Los Angeles*, 262 U. S. 700, at 705 (1923). A taking which, as here, merely swells the general treasury of the United States does not meet this test and is, therefore, without due process of law (see Brief, *infra*, pp. 30-31).

C

The Questions Presented to This Court

The precise question before this Court is:

> Does the 1943 amendment of the False Claims Statute, as applied to this case, deprive petitioner of

his property without due process of law, in violation of the Fifth Amendment of the Constitution of the United States?

In *Nathanson* v. *U. S.*, 321 U. S. 746 (1944), this question was reserved. It is now squarely presented.

The answer depends on a number of subsidiary questions:

1. Has the relator in a private suit under the False Claims Statute a *contract right* against the United States, protected by the Constitution, to seek judgment for and to collect his half of the recovery?

The Circuit Court's *per curiam* opinion avoids an answer. But if, as we believe, the Circuit Court's own ground of decision (that petitioner has an adequate remedy in the Court of Claims) fails, the question must be answered.

Even if a contract between the United States and petitioner were denied, the question would remain:

2. Does a relator suing under the False Claims Statute acquire, *by operation of law*, a property right in the cause of action, protected by the Constitution?

Again the Circuit Court, although apparently impressed by our authorities, avoided the answer. But again that answer is called for, if, as we propose to show, the Circuit Court's own ground lacks force.

3. Does the power of Congress to regulate the jurisdiction of the district courts (Constitution, Art. III, §1) sustain the 1943 amendment?

Respondents so argued. But under the guise of regulating jurisdiction the 1943 amendment deprived petitioner of the only forum available to him, thereby in effect destroying his right.

Finally, the question going to the heart of the Circuit Court's decision is:

> 4. Can the taking of petitioner's property be sustained on the ground that he may sue the United States for compensation in the Court of Claims?

D

Grounds for Granting the Writ of Certiorari

1. The constitutionality of the 1943 amendment of the False Claims Statute, as applied to *qui tam* actions pending at the time of its enactment, has not been, but should be, determined by this Court.

(a) The rights of a litigant under the Constitution are commended to the particular vigilance and protection of this Court. The Court below ruled that the constitutionality of the 1943 amendment is "the bare question before us" (R. 61). An application for review in such a case should strongly appeal to the discretion of this Court.

(b) At the time of the enactment of the 1943 amendment there were pending more than 250 private actions under the False Claims Statute (*Cong. Rec.*, 78th Cong., 1st Sess., p. 10845, col. 3, p. 10846, col. 1). Their fate will be controlled by the decision of this Court.

(c) This Court's decision will also control *qui tam* actions hereafter to be brought under the 1943 amendment. For where the Government fails or refuses to enter its appearance in such an action within the sixty-day period allowed by R. S., §3491(C), as amended, the relator's position under the new statute is substantially the same as under the old. If the decision below is permitted to stand, the relator in any such action will, until final judgment therein, remain in danger of being ousted by the Government, be it by legislative or executive action. To cast such

a cloud of uncertainty upon every future *qui tam* action would hardly encourage the institution of this type of suit, although Congress manifestly intended its preservation. And this is equally applicable to the numerous other types of *qui tam* actions authorized by federal statutes, such as 35 U. S. C., §50, and other statutes cited in *U. S. ex rel. Marcus* v. *Hess, supra,* 217 U. S., at 541, n. 4.

Even before the 1943 amendment was enacted, the Eighth Circuit Court held, in *U. S.* v. *Baker-Lockwood Mfg. Co.,* 138 F. 2d 48, at 52-3 (1943), rev'd on other grounds *sub nom. Nathanson* v. *U. S.,* 321 U. S. 746 (1944), that the Government may supersede an earlier *qui tam* action by filing a suit of its own. Respondents deduce that the relator in a *qui tam* suit can have no vested right. But the Court below declared the *Baker-Lockwood* case "open to conceivable doubt" (R. 61); it is, we submit, in conflict with earlier authorities (*infra,* p. 17); and it seems refuted by this Court's dictum in *U. S. ex rel. Marcus* v. *Hess, supra,* 317 U. S., at 547-8, that only the filing of a *prior* suit by the Government bars a later *qui tam* action. But the Government claims that the *Baker-Lockwood* case is still controlling (R. 20). The conflict of authorities emphasizes the need for review by this Court.

2. In ruling that petitioner's property was not unconstitutionally taken because he may sue for compensation in the Court of Claims, the Circuit Court decided a federal question in a way probably in conflict with applicable decisions of this court, such as *U. S.* v. *Lynah,* 188 U. S. 445 (1903); *Tempel* v. *U. S.,* 248 U. S. 121 (1918); *John Horstman Co.* v. *U. S.,* 257 U. S. 138 (1921). We propose to show this conflict in our brief (*infra,* pp. 27-30). If the decision below were permitted to stand, it would have most prejudicial effects. The Government, although not purporting to act under its power of eminent domain, could be made a condemnor *in invitum* of property which it never intended to expropriate; and it could be sued for compensation in the Court of Claims although it demonstrably

never intended to make a contract for compensation. And on the other hand the Circuit Court's decision would expand the concept of "public use", for which property may be taken by eminent domain, beyond all limits heretofore recognized by this Court.

If the decision below is reversed and petitioner is permitted to prosecute this action, the Government need not fear that it cannot safeguard its interests. Its remedy is by intervention, Rule 24 F. R. C. P., which may even be obligatory upon the Government, R. S., §3492. Petitioner will certainly not oppose it.

WHEREFORE, petitioner prays that a writ of certiorari to the Circuit Court of Appeals for the Second Circuit be granted.

MOSES B. SHERR,
Petitioner pro se.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

MOSES B. SHERR, being duly sworn, deposes and says; that he is the petitioner herein; that he has read the within petition and knows the contents thereof; that the same is true to his own knowledge, except as to those matters therein stated upon information and belief, and that as to those matters he believes it to be true.

MOSES B. SHERR.

Sworn to before me this
12th day of September, 1945.

SYLVIA SOBELMAN,
Notary Public.
King's Co. Clk's No. 357, Reg. No. 365S6.
N. Y. Co. Clk's No. 468, Reg. No. 271S6.
Commission expires March 30, 1946.